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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of

MARC SOBEL

Applicant for Certain Part 90 Authorizations in the
Los Angeles Area and Requestor of Certain
Finder's Preferences

MARC SOBEL AND MARC SOBEL
D/B/A AIR WAVE COMMUNICATIONS

Licensee of Certain Part 90 Stations in the
Los Angeles Area

To: The Honorable John M. Frysiak
Presiding Administrative Law Judge

WT Docket No. 97-56

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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SUMMARY OF ARGUMENT

The Bureau has failed to meet its burden of proof in this proceeding. There is no support in the record for the Bureau's assertion that Marc Sobel has engaged in unauthorized transfer of control of his stations, or that he has misrepresented facts to or withheld material information from the Commission.

The record shows that Marc Sobel is a small businessman engaged in the land mobile radio industry in Los Angeles. While he has a personal friendship and a close business relationship with James A. Kay, Jr., he is entirely independent of Kay. Sobel operates UHF repeaters in which Kay has no significant involvement whatsoever. As to Sobel's 800 MHz stations, Kay leases equipment and sites to Sobel, Kay sells service on the channels, and also satisfies any other operating costs. Kay receives the first \$600 per repeater per month to offset these expenses, and any additional revenue is to be divided equally between Sobel and Kay.

Sobel maintains an active and controlling role as to the 800 MHz stations. Sobel installed the equipment, and Sobel maintains and repairs it. Sobel has unrestricted access to all transmitter sites, and unfettered access to and use of all station equipment. Sobel activates and deactivates customers, consults with Kay regarding any non-routine placement of customers, consults with Kay (and has on occasion overruled Kay) as to rates to be charged, has unrestricted access to all customer records, and has maintained complete oversight of all FCC filings.

Sobel and Kay have entered into a business arrangement that is common in the industry and is mutually beneficial to both parties. The Commission should not interfere with the business judgments of the parties. "As long as the licensee maintains the requisite degree of control ... consistent with its status as a licensee, [the Commission] will not question its business judgment concerning the agreements into which it enters." *Motorola, Inc. (Order, issued 30 July 1985, File Nos. 50705 et al.)* at ¶ 21. The Bureau has utterly failed in meeting its burden of proof that there has been an unauthorized transfer of control and that Sobel is unqualified.

The Presiding ALJ should resolve all issues in this proceeding favor of Sobel and direct the Bureau to process the captioned applications forthwith.

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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Marc D. Sobel d/b/a Air Wave Communications ("Sobel"), by his attorney and pursuant to Sections 1.263 and 1.264 of the Commission's Rules and Regulations, 47 C.F.R. § 1.263-1.264, hereby offers his proposed findings of Fact and Conclusions of Law in the captioned proceeding, in support whereof the following is respectfully shown:

I. PROCEDURAL BACKGROUND

1. This proceeding was initiated by the *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing and for Forfeiture* (hereinafter referred to as "HDO"), FCC 97-38, 6 C.R. 641 (released 12 February 1997). The Commission designated the following issues for resolution:

- (a) To determine whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications have willfully and/or repeatedly violated Sec. 310(d) of the Communications Act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations to James A. Kay, Jr.;
- (b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications are qualified to be and remain Commission licensees;

(c) To determine whether the above-captioned applications filed by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be granted.

(d) To determine whether the above-captioned licenses held by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be revoked.

HDO at ¶ 6. As required by Section 312(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(d), the burden of proceeding with the introduction of evidence and the burden of proof were placed on the Wireless Telecommunications Bureau (the "Bureau"), a party to the proceeding, as to issues (a), (b), and (d). The burden of proceeding with the introduction of evidence and the burden of proof as to issue (c) were placed on Sobel. HDO at ¶ 10.

2. By his *Memorandum Opinion and Order* (hereinafter referred to as "*MO&O Adding Issues*"), FCC 97M-82, released 8 May 1997, the Presiding ALJ, acting upon a motion to enlarge submitted by the Bureau, enlarged the scope of the proceeding by adding the following issues:

(a) To determine whether Marc Sobel misrepresented material facts or lacked candor in his affidavit of January 24, 1995.

(b) To determine, based on the evidence adduced pursuant to the foregoing issue, whether Marc Sobel is basically qualified to be and remain a Commission licensee.

MO&O Adding Issues at pp. 2-3 (first ordering clause). The burdens of proceeding and proof were placed on the Bureau. *MO&O Adding Issues* at p. 3 (second ordering clause).¹

3. A prehearing conference was held in this matter on 19 March 1997. *Tr.* at 1-13.² At that time the Presiding ALJ set 29 July 1997 as the date for commencement of the hearing. *Tr.* at 10. This was later confirmed by his *Order*, FCC 97M-42 (released 21 March 1997). At the prehearing conference the Presiding ALJ also granted James A. Kay, Jr. ("Kay") leave to intervene. *Tr.* at 5. This oral ruling was later confirmed by the Presiding ALJ's *Memorandum Opinion and Order*, FCC 97M-43 (released 24 March 1997).

¹ Sobel respectfully submits that the Commission has not met its burden of proceeding and its burden of proof on the added misrepresentation issues, and Sobel proposes herein no further findings or conclusions with respect thereto. Sobel denies the allegations of misrepresentation and reserves the right to reply to any proposed findings or conclusions offered by the Bureau on the added issues.

² The transcript of the hearing proceedings held on 29-30 July 1997, was initially incorrectly numbered from pages 1-363. It was later corrected to page numbers 14-379 to adjust for the first 13 numbered transcript pages from 19 March 1997 prehearing conference.

4. The hearing in this matter was held on July 29 and 30, 1997, in Washington, D.C. The Bureau called only two witnesses, namely, Messrs. Sobel and Kay. Sobel also testified as part of his own case in chief. All direct examination, cross-examination, re-direct, re-cross, etc., was by live testimony at the hearing. Only supporting exhibits were pre-filed. A total of 47 exhibits were introduced by the Bureau and admitted into evidence (WTB Ex. Nos. 1 through 47). A total of 6 exhibits were introduced by Sobel and admitted into evidence (SBL Ex. Nos. 1 through 6).

5. The Presiding ALJ ordered the record in this proceeding closed on 29 July and established 15 September 1997 as the filing date for proposed findings of fact and conclusions of law. Order, FCC 97M-134 (released 5 August 1997). The parties' proffered transcript corrections were accepted by the Presiding ALJ. Order, FCC 97M-152 (released 9 September 1997) and Order, FCC 97M-153 (released 9 September 1997). On a motion by Sobel, the Presiding ALJ extended the time for submitting proposed findings of fact and conclusions of law to 25 September 1997. Order, FCC 97M-151 (released 9 September 1997). The current due date for reply findings and conclusions is 16 October 1997. *Id.*

II. PROPOSED FINDINGS OF FACT

A. Sobel's Independent Land Mobile Radio Operations

6. Marc David Sobel ("Sobel") has been involved in the land mobile radio business in the Los Angeles area for approximately twenty years. (Tr. 68) In that capacity he operates and maintains UHF (450 MHz and 470-512 MHz) repeaters on which he sells service to various business users; installs, maintains, and repairs repeaters and radio systems for other land mobile radio licensees; and provides consulting services on the design and operation of such radio systems. (Tr. 68) He is also an authorized mobile radio equipment dealer for several vendors, selling and leasing mobile radio equipment to repeater licensees and end users. (Tr. 68, 107)

7. Sobel has, at all relevant times, conducted his business operations as an individual sole proprietorship, doing business under the trade name Airwave Communications, which is sometimes written as Air Wave (two words) Communications. (Tr. 174) Sobel has no employees. (Tr. 130, 175) He operates his business from his personal residence, (Tr. 175) where he maintains specific and discrete areas for his workshop, office, and warehouse for equipment and parts. (Tr. 185-190; SBL Ex. 4) Sobel

has an extensive amount of office equipment, radios, tools, and test equipment (including a service monitor valued at approximately \$19,000), all of which he owns and purchased with his own funds. (Tr. 248-249) Sobel also leases a truck for use in his land mobile radio operations. The lease is in his name and he personally makes the payments. (Tr. 248)

8. Sobel obtained his first UHF repeater authorization from the FCC in 1978. (Tr. 68, 172) This repeater generated supplemental income for Sobel while he maintained full time employment, first as an employee at an electronics parts store, then as an owner/operator of a tour bus, and later as an aquarium store owner/operator with his brothers. Meanwhile, Sobel continued to obtain UHF repeater licenses and increase his land mobile radio activities. (Tr. 173-174) By the late 1980's Sobel's UHF repeaters and other land mobile activities were generating enough revenue to permit him to leave the aquarium store and devoted himself full time to his radio business. (Tr. 174)

9. Sobel's UHF repeaters are and always have been entirely independent of James Kay or any other individual or entity other than Marc Sobel. The UHF licenses were applied for and obtained by Sobel, the equipment was leased or purchased by Sobel, and the customers are serviced and billed by Sobel. The transmitter site and antenna space at some of Sobel's UHF repeater locations are leased or subleased from Kay. These are the result of an arm's length transaction, and Sobel makes monthly cash payments to Kay. (Tr. 180-182) Sobel's UHF repeaters, his equipment sales, and his consulting, installation, maintenance, and repair services, not counting any amounts received from James Kay or Kay's companies, accounts for approximately 86% of Sobel's business revenues. (Tr. 252-257)

B. Sobel's Relationship With James Kay

10. Sobel and Kay have been personal friends since the 1970's. (Tr. 71) Their personal friendship has extended to their respective business operations as well. In the late 1970's or early 1980's, Sobel introduced Kay to the land mobile repeater business. (Tr. 183) Kay thereupon began obtaining repeater licenses and developed his own land mobile radio business. Acting as an independent contractor, Sobel provided installation, maintenance, and repair services for Kay and other operators and dealers. (Tr. 106, 150, 158, 246, 327)

11. Sobel is not and has never been an employee of Kay. (Tr. 246) Sobel is an independent contractor vis-à-vis Kay, and Kay is an independent contractor vis-à-vis Sobel. (Tr. 144, 151, 158, 246, 271, 327) The parties believe that their arrangement satisfies the Internal Revenue Service ("IRS") guidelines for what constitutes an independent contractor, and the IRS has never challenged their characterization. (Tr. 247) Sobel is not dependent upon any of his business dealings with Kay for his financial survival. For the years from 1992 through 1996, only 14% of Sobel's gross revenues were attributable to funds received from Kay,³ either in connection with the 800 MHz repeaters or otherwise. Thus, 86% of Sobel's income is derived from sources entirely unrelated to Kay, including Sobel's UHF repeater operations, his consulting services, his equipment dealerships, and his installation, maintenance, and repair services. (Tr. 252-257)

C. The Oral Resale Arrangement Regarding Sobel's 800 MHz Repeater

12. At some time in the mid-to-late 1980's, Sobel became interested in pursuing opportunities in the 800 MHz frequency range. Because Kay already held 800 MHz licenses by this time, Sobel enlisted his assistance. (Tr. 73, 183-184) He conferred with Kay and the two of them entered into an oral arrangement whereby Kay would assist Sobel in obtaining licenses for 800 MHz repeaters. Kay assisted Sobel in the preparation and filing of the FCC applications for the 800 MHz repeaters. This was done primarily as a matter of convenience, because Kay had a software package from Slattery Software that automated the preparation of the necessary forms. (Tr. 184-185) The applications were prepared at Kay's office on his computer, sometimes by Sobel and sometimes by Kay. (Tr. 74-75) Regardless of who prepared a particular application, however, no application on behalf of Sobel was ever filed with the Commission before it was personally reviewed, approved, and signed by Sobel. From time to time, Kay would also assist Sobel in responding to FCC inquiries and correspondence, sometimes drafting letters to be submitted on behalf of Sobel. As to these communications, as well, they were prepared at Sobel's direction and under his supervision, and nothing was ever filed with the Commission on Sobel's behalf prior to his final review, approval, and signature. (Tr. 75, 206-207, 222-223)

³ The approximate annual percentages are 10% for 1996, 14% for 1995, 13% for 1994, 17% for 1993, and 13% for 1992. (Tr. 252-257)

13. Sobel made an informed business decision to enter into an arrangement with Kay regarding the 800 MHz repeaters. Their oral understanding provided that Kay would provide Sobel with the base station equipment and, where necessary, provide transmitter site and antenna space to Sobel. Kay would market service on the system to end users, *i.e.*, act as a reseller. (Tr. 103) It was further agreed that Sobel would perform the installation, maintenance, and repair for the 800 MHz systems. Kay was to assume the operating costs of the repeaters, including compensating Sobel for the installation, maintenance and repairs. (Tr. 106) In exchange for his undertakings, Kay was entitled to the first \$600 of monthly revenue, per repeater. Sobel and Kay were to divide equally any revenue in excess of \$600 per repeater per month. (Tr. 104)

14. As one directly involved in and intimately familiar with the Los Angeles area land mobile radio industry, Sobel considered this arrangement to be a favorable business transaction for several reasons. It allowed Sobel to expand his holdings into the 800 MHz band while minimizing his financial risk. This was important to him because there were significant differences between the 800 MHz and the UHF repeater operations. The 800 MHz repeaters cost roughly three times more than UHF repeaters, and the end user equipment for 800 MHz was at least twice the cost of UHF radios. Marketing to potential 800 MHz users was a different niche than the UHF customers to whom Sobel had catered to that time. Kay already had an established track record and an existing client base for 800 MHz services, and Sobel determined that he could build 800 MHz revenue more rapidly by selling or leasing his channel capacity to Kay than by marketing the service directly. (Tr. 184) Moreover, Sobel stood to realize significant future income because he was entitled to one half of all revenue after the first \$600 per repeater per month.

15. Had Sobel pursued the 800 MHz repeaters on his own, rather than through the arrangement with Kay, he would have had to purchase or lease repeater equipment, lease or sublease site space, and pay for, or perform on his own as "sweat-equity," installation, maintenance, and repair services. (Tr. 185-187) He would thus have incurred monthly costs well in excess \$600. It was, in Sobel's judgment, therefore a sound business move for him to give Kay the first \$600 in monthly revenue in exchange for providing these services, particularly when Sobel would be receiving some of it back in the form of payments for his own services. (Tr. 186) Moreover, even if Sobel had pursued this project on his own, he still would have leased many, if not all, of the same sites from Kay (a typical arrangement in the

industry to achieve economies of scale) and would have chosen repeater equipment compatible with Kay's (to allow them to operate their systems cooperatively to provide better service to their respective customers) and. (Tr. 320-321) The only significant difference would have been increased financial obligations on Sobel's part.

16. Insofar as the provision of service on Sobel's 800 MHz stations is concerned, the arrangement between Kay and Sobel is essentially a "resale" arrangement or a lease of "channel capacity." (Tr. 153) This is an arrangement that is quite common in the mobile wireless telecommunications industry, including SMRS, cellular, paging, dispatch, etc. Under a resale or lease of channel capacity arrangement, one party holds the FCC license, and another party (the non-licensee) contracts for access to the system in order to provide service to end users. In Sobel's experience, many purveyors of repeater service in the Los Angeles area do so not through their own licenses, but rather by means of channel capacity they acquire from other licensees. (Tr. 190-192) This is the arrangement Kay and Sobel established with respect to Sobel's 800 MHz repeaters. Sobel is the facilities-based licensee and Kay is the reseller. Thus, while the stations were licensed to and belonged to Sobel, the customer contracts with users on the stations belong to Kay. (Tr. 192) But Sobel maintains much greater customer contact and involvement with and control over the end users than does a typical facilities-based carrier whose facilities are resold. He performs virtually all of the security activations necessary to enable a customer to use one of his repeaters, and he has full access to the customer records maintained on Kay's computer system.

17. Kay negotiates the customer contracts and does the billing and collecting—he is the one selling the service to end users under this resale arrangement. But Sobel is the one who activates and deactivates customers on the system. (Tr. 124, 188-189) Sobel has even, on occasion, overruled Kay as to the rate to be charged to particular customers, even though the customers and the customer contracts belong to Kay. (Tr. 123) As to all functional and operational aspects of the 800 MHz repeaters, Sobel has full and unfettered control. (Tr. 192) He has unrestricted access to all the repeater sites. (Tr. 189-190) He can control the repeaters, by use of special security codes, from control points at his home office and in his truck. (Tr. 224-228) Sobel performed virtually all of the installation work on the repeaters, he performs all of the regular maintenance, and he is almost always the one who does repairs in the event of a failure

or malfunction. (Tr. 104, 107, 112, 185) While Kay pays Sobel an hourly rate for such installation, maintenance, and repair work, this is simply part of a business arrangement negotiated by Sobel whereby he derives immediate income from the stations. (Tr. 106, 185)

18. Sobel monitors the progress of Kay's marketing activities to determine when the \$600 revenue figure is met and he can begin receiving one half of the excess revenue. Because he activates and deactivates customers, Sobel is continually aware of the subscriber levels on each repeater. (Tr. 187-188) In addition, Sobel periodically examines the repeater billing records to determine the precise revenue levels. (Tr. 121) Of fifteen 800 MHz repeaters subject to the Sobel/Kay arrangement, four have met or exceeded the \$600 monthly revenue level, while the rest have not. (Tr. 132, 185)⁴ Sobel anticipated collecting significant revenue from his 800 MHz repeater operations long before now, but a moratorium on processing of his FCC applications and filings has prevented him from improving the stations and has thus retarded subscriber growth on the repeaters. Sobel believes that, but for this processing freeze, "today [he] would be making quite a bit of money," but for the Bureau's freeze on processing his filings. (Tr. 185)

D. The Written "Management" Agreement

19. At some point in 1994, Sobel became aware of some unusual delays in processing of his applications and filings, extending even to applications of third parties for whom he had provided application preparation assistance as a consultant. Upon consultation with Bureau staff, Sobel learned that his filings were being delayed in connection with an investigation of complaints against Kay. Initially Sobel assumed that he was being included in the scope of the Bureau's inquiry because of his business relationship with Kay. Sobel wrote to the Bureau in an effort to clarify this matter. (Tr. 172; WTB Ex. 46) He later came to discover, however, that the Bureau was apparently of the opinion that Marc Sobel was merely a fictitious name under which Kay was doing business.

20. In late September or early October of 1994, Kay informed Sobel that he had obtained, through a Freedom of Information Act request, a draft of an order seeking to revoke all of Kay's FCC authorizations. Kay read to Sobel (and later showed him) a passage from that draft order containing language substantially the same, if not identical to, language that appeared in the final version of the

order, namely: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions We believe these names include ... AirWave Communications [and] Marc Sobel, d/b/a AirWave Communications." (Tr. 166) At this point Sobel became concerned that the Bureau appeared not to be aware that he (Sobel) was an individual, separate and apart from Kay, with his own separate business operations. (Tr. 167-168) In order to document his distinctness from Kay. In order to document that Sobel and Kay were separate business entities, Sobel requested that the arrangement with Kay regarding the 800 MHz repeaters be reduced to writing. (Tr. 109)

21. The Washington, D.C. communications law firm of Brown and Schwaninger ("B&S") was engaged to prepare the written agreement. B&S was, at that time, serving as FCC counsel to both Kay and Sobel. (Tr. 109) B&S were directed to prepare an agreement and they did so, advising Sobel that it complied with FCC requirements. (Tr. 263) The result of their efforts was the Radio System Management and Marketing Agreement dated October 30, 1994. (WTB Ex. 38) Sobel did not study the agreement carefully before signing it, relying instead on his belief that his attorneys had prepared an agreement that codified his relationship with Kay and complied with FCC requirements. (Tr. 109, 263-264) Sobel's failure to evaluate the document more carefully is explained by the business terms were not the motivation for creating the document—Kay was a trusted friend with whom Sobel conducted much business base only on oral understandings. As Sobel testified, the written agreement was not for the benefit of the parties; rather, it's purpose was to document the existence of Sobel and Kay as two distinct and separate entities. (Tr. 262-263, 305)

22. The arrangement for the 800 MHz repeaters was entered into as an informal oral understanding between two personal friends and business colleagues who fully trusted one another. The purpose of the written agreement, therefore, was not to create or modify any particular business terms or conditions. Kay and Sobel had operated pursuant to an oral understanding for approximately two to three years prior to the October 1994 agreement. (Tr. 257-258) Sobel was not in any way displeased with the arrangement, nor was he unhappy in any way with Kay's performance. (Tr.258) Moreover, the parties did not change any aspect of their operations or relationship as a result of the written agreement. (Tr. 263)

⁴ It is understood between the parties that Sobel will begin sharing in the excess revenue at such time as

E. The Option to Purchase

23. A second written agreement was executed by the parties on December 30, 1994. (Tr. 110; WTB Ex. 40; SBL Ex. 3) This was done to add some stations that were inadvertently omitted from the October agreement, and because Kay had neglected to timely pay a fee of \$100 per station to trigger an option to purchase the stations from Sobel for \$500 each, (Tr. 111) yet a further indication that the parties were not focused on the specific legal terms of the agreement. At some time after Sobel obtained his first 800 MHz license, but prior to entering into the written agreement, he and Kay had discussed in general terms what would happen should one of Sobel's 800 MHz stations be sold. (Tr. 108) It was generally understood that Kay would be compensated commensurate with any time, effort, and expense he had put into increasing the value of the stations. Moreover, Kay wanted an option to protect himself because he was entering into five year contracts for service to customers being placed on the Sobel 800 MHz repeaters. If Sobel were to assign a station to a third party, Kay could be left without adequate capacity to discharge his obligations under the service contracts. Kay needed the option to protect him in that regard. (Tr. 365-366)

24. Sobel's understanding of how an option operated was that it has no effect unless and until it is exercised, and that even then the parties could not act on an exercised option until such time as FCC approval for any transfer of control or assignment of license had been obtained. (Tr.148, 269-270) Further, Sobel's of the view that the \$500 option price is not unreasonable, given the nature of the stations at the time he acquired them. Virtually every 800 MHz channel licensed to Sobel was "encumbered" at the time he initially obtained the authorization. This means that Sobel's license to use the channel in the Los Angeles area was not exclusive. Other licenses were issued to other shared users, thereby greatly reducing the value of the channels. (Tr. 93-99) Kay provided the vast majority of the work, effort, and expense that went toward "clearing" channels, *i.e.*, seeking cancellation of invalid co-channel licenses, striking deals with valid co-channel license holders, etc. It was Sobel's understanding that Kay would recoup this value if a channel were ever sold to a third party. (Tr. 93-99)

25. Neither Sobel nor Kay was in the mode of selling or disposing of stations. Sobel would from time to time sell or otherwise assign a station as part of "horse trading" in order to improve the

the aggregate monthly revenue for all repeaters exceeds an average of \$600 per repeater. (Tr. 132)

coverage, quality, and reliability of his overall system, but he was generally in the acquisition rather than the disposition mode. (Tr. 267-268) In the event a station was sold or otherwise disposed of, Sobel had no doubt that he and Kay would come to mutually agreeable terms notwithstanding the existence of the \$500 option. On one occasion for example, Kay negotiated for the sale of one of Sobel's stations, for which Sobel was paid \$20,500—far more than the \$500 option price (Tr. 126-127), and, more significantly, an amount dictated by Sobel. (Tr. 374) On another occasion, Kay advised Sobel of an opportunity to sell all of his 800 MHz stations for \$1,500,000. Although this was at a time when Kay very much needed the money because of his legal problems, and notwithstanding the \$500 option provision in the written agreement, Sobel vetoed the deal because he did not want to sell his stations at that time. (Tr. 274-275) The parties have thus continued to rely on their oral arrangement and their long standing friendship, rather than the written \$500 option provision.

F. Conclusion

26. However one may characterize Kay's involvement with Sobel's 800 MHz repeaters, Sobel is not an absentee owner who has simply abdicated matters to Kay. Sobel is directly and continually involved in the operation of the stations.⁵ Sobel has unrestricted access to all sites and unfettered use of all the facilities and equipment used in the stations. He has keys and security clearances to all the sites, and visits them on a regular and routine basis. (Tr. 189-190) Sobel controls the daily operations of the 800 MHz repeaters. In addition to having direct access to the transmitter sites, the authorized control point for each of Sobel's stations is at his home office, and he also maintains a control point from his truck. (Tr. 224-228)

27. Sobel determines and carries out all policy decisions, including the preparation and filing of applications with the Commission. Sobel relies on Kay's expertise and advice in this regard, but he is familiar with FCC rules and procedures, and nothing is filed with the FCC on his behalf without his review, approval, and signature. Sobel determines the price to be charged for service on the 800 MHz repeaters, and Sobel is often involved in the decision to place or not place specific users on the 800 MHz repeaters.

⁵ The operation of Sobel's 800 MHz repeaters is not a labor intensive business, and he has no employees. Kay uses his own employees to resell service on Sobel's 800 MHz repeaters, but Kay has not hired any additional employees for this purpose. (Tr. 266)

In short, Sobel is directly and intimately involved, on a daily basis, with virtually all aspects of the 800 MHz repeater operations.

III. PROPOSED CONCLUSIONS OF LAW

A. Introduction

28. Section 310(d) of the Communications Act of 1934, as amended, provides, in pertinent part: "No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby." 47 U.S.C. § 310(d). Section 90.153 of the Commission's Rules and Regulations, which governs the particular authorizations at issue in this proceeding, further provides: "A station authorization and the rights it grants shall not be transferred, assigned, or in any manner disposed of to any person, unless the Commission shall, after obtaining full information, decide that the transfer, assignment, or disposal is in the public interest, convenience or necessity and give its consent in writing." 47 C.F.R. § 90.153. The issues designated in this proceeding all involve the question whether Sobel had violated these provisions by transferring control of his Part 90 authorizations to Kay. In particular, the Commission is concerned that the December 30, 1994, *Radio System Management and Marketing Agreement* between Kay and Sobel constitutes an unauthorized transfer of control

29. Insofar as Sobel's UHF repeater licenses are concerned, there is no evidence in the record sufficient to make even a prima facie case of an unauthorized transfer of control to Kay or to anyone else. Sobel obtained these authorizations on his own, without any assistance from Kay. Indeed, Sobel began his UHF repeater operations before Kay was even involved in the Los Angeles land mobile radio business. Kay has no involvement whatsoever in the ownership, construction, installation, maintenance, or operation of these stations, and is not in any way involved in the services provided on these stations. Sobel does lease site space from Kay for some of his UHF repeater stations, but this is an arms length transaction, typical in the industry. Sobel therefore respectfully submits that, as a matter of law, Sobel has at all time maintained appropriate control of his UHF repeater stations. Accordingly, the remainder of these conclusions will be limited to Sobel's 800 MHz authorizations that are subject to the

arrangement between Sobel and Kay, i.e., those authorizations copies of which are set forth in WTB Exhibit Nos. 5 through 18.

B. Intermountain Microwave

30. The Commission has long recognized that there is no exact formula by which control of a Title III authorization can be determined. The determination of whether a transfer of control has occurred requires looking beyond the legal title to determine whether there are any actions reflecting a new entity or individual with the right to determine the basic policies and ultimate control of the station. See, *WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Whether there has been a transfer of control is a question of fact that must be resolved by examining the specific circumstances on a case-by-case basis. The Commission typically considers the following six indicia of control, as announced in *Intermountain Microwave*, 24 RR 983 (1963):

- (a) Does the licensee have unfettered use of all facilities and equipment?
- (b) Who controls daily operations?
- (c) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
- (d) Who is in charge of employment, supervision, and dismissal of personnel?
- (e) Who is in charge of the payment of financing obligations, including expenses arising out of operating?
- (f) Who receives monies and profits from the operation of the facilities?

See *HDO* at ¶ 4.

31. The *Intermountain Microwave* criteria are not, however, a mere mechanical check list from which one may tick off items to arrive at an objective determination of control. As the Commission has explained

[t]he *Intermountain* factors represent the normal incidents of responsibility for the operation and control of a common carrier facility. ... As such, they generally provide useful guidelines for evaluating real-party-in-interest and transfer of control questions. We

stress, however, that there is no exact formula for determining control and that questions of control turn on the specific circumstances of the case. ... Thus, in applying the Intermountain criteria, we examine the totality of the circumstances.

La Star Cellular Telephone Company, 9 FCC Rcd 7108, 7109 (1994) (emphasis added), citing *Data Transmission Co.*, 44 FCC 2d 935, 936 (1974).. No single factor, in itself is controlling, rather, each particular situation is unique and must be carefully evaluated in light of all six factors. *Volunteers in Technical Assistance*, 1997 FCC LEXIS 4947 (FCC 97-308; released 11 September 1997).

32. The answers derived from application of *Intermountain Microwave* will vary from service to service and, even within a particular service or industry, will vary from case to case. In the broadcast services, for example, station programming has been a significant area of consideration, e.g., *S.W. Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981), while this is not of as much, if any, regulatory concern in common carrier and other radio services that do not dictate content, but rather provide a telecommunications "conduit" for their customers or subscribers. *Cablecom General, Inc.*, 87 FCC 2d 784 (1981). As to SMR and dispatch services, the Commission has stated:

As the SMR industry has matured, licensees have inevitably sought to avail themselves of a variety of methods to operate and manage their systems. In this dynamic and developing marketplace we wish to allow maximum flexibility to these entrepreneurs, consistent with the regulatory restraints imposed by the Communications Act. We also wish to assure licensees may employ a variety of options so that they may provide an efficient and effective communications service to the public as quickly as possible. In light of these policy objectives, and as a general proposition, we see no reason why SMR licensees should be precluded from hiring third parties to manage their systems provided that the licensees retain a proprietary interest, either as owner or lessee, in the system's equipment and exercise the supervision the system requires.

Motorola, Inc. (Order, issued 30 July 1985, File Nos. 50705 et al.) at ¶ 18.⁶ It is with this in mind that we examine the record in this proceeding in light of the *Intermountain Microwave* indicia.

(i) Does the licensee have unfettered use of all facilities and equipment?

32. There is little question that Sobel enjoys unfettered use of all facilities and equipment used for his 800 MHz repeaters. He has unrestricted access to all transmitter sites. He has control points for each repeater at his home office and in his work vehicle. He has all the security codes and is able to

⁶ Although not officially reported, the *Motorola* decision has become the lead case on the issue of whether SMR or dispatch management agreements constitute transfers of control. A copy of the decision (the best copy available to counsel) has been appended to this pleading for convenience of the Presiding ALJ and the parties. We note that while the above-quoted language refers to "hiring third parties," it is clear from the context that the decision is referring to contractual management agreements rather than an employer-employee relationship.

personally activate and deactivate both individual customers and the repeaters themselves. Although Sobel does not have legal title to the repeater equipment in the sense that he owns it, this is because he made a business decision to rent the equipment from Kay. This was a sound business decision motivated by the facts that Kay already had equipment on hand, that Kay was willing to defer rental payments until the stations generated revenue, and using Kay's equipment would assure compatibility of Sobel's stations with Kay's, enabling them to operate cooperatively and thus offer improved services to the public.

33. This factor, as all of the *Intermountain Microwave* indicia, must be applied in the context of the particular radio service and industry involved. "[T]he Intermountain guideline of 'unfettered use' adopted 31 years ago in the context of a less sophisticated, 'mom-and-pop' owner, stand-alone microwave system must be construed in light of the current realities" *Ellis Thompson Corp., Summary Decision of Administrative Law Judge Joseph Chachkin* ("ETC Summary Decision"), 10 FCC Rcd 12554, 12556 (1995). There is no rule or regulation prohibiting a licensee from leasing rather than purchasing the equipment used in its station. Indeed, the Commission has expressly stated that, in the SMR service, the licensee may establish its requisite "proprietary interest [in the station equipment] either as owner or lessee." *Motorola, Inc.* at ¶ 18.⁷ Even assuming Sobel's decision to lease from Kay warrants scrutiny in light of Kay's additional involvement with the 800 MHz repeaters, but the record in this proceeding demonstrates that there were sound business reasons for Sobel to lease from Kay. *Cf. ETC Summary Decision*, 10 FCC Rcd at 12557 (approving a licensee's decision to enter into an agreement "of his own free will for prudent financial and competitive reasons"). Kay's involvement with the stations has not in any way interfered with or diminished Sobel's unfettered access to and use of the facilities.

(ii) Who controls daily operations?

34. This case is unique, and possibly one of first impression insofar as the particular issues to be decided. In most cases where it is alleged that a mobile telecommunications licensee has contracted away control to a third party, the licensee is an absentee owner who has very little involvement in the day to day affairs of the station. That is not the case here. Sobel is intimately and completely

⁷ The initial \$600 monthly revenue to which Kay is entitled is primarily to compensate him for leasing the repeater equipment and the site space to Sobel. The oral lease arrangement was later codified in the written agreement. "Agent shall lease to Licensee all equipment necessary to construct and operate the Stations. All rents to be collected by Agent for lease of equipment to Licensee shall be deemed by the Parties to be a portion of Agent's compensation for services described herein." (SBL Ex. 3, p. 3, ¶ IV)

involved in the daily operations of his 800 MHz repeaters. He personally constructed the facilities, and to this day he personally maintains and repairs them. Although he has contracted the channel capacity to Kay and relies on Kay to obtain subscribers for the stations as a reseller, Sobel nonetheless personally activates and deactivates individual subscriber units. The record shows that Sobel is a local resident, hands-on owner who has remained actively and fully involved in all aspects of the day to day operations.

(iii) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?

35. Once again, the *Intermountain Microwave* indicia must be evaluated in the context of the particular industry. Sobel is not the licensee of a cellular operation having hundreds of cell sites with a vast array of expensive equipment, nor is he the licensee of a broadcast facility having numerous personnel, advertising, and programming decisions to make on a daily basis. He is the licensee of a collection of repeaters providing dispatch services to various business users in the Los Angeles area. There are relatively few policy decisions to be made in such a business. The few ongoing decisions to be made include determining on which particular repeater to place a particular customer. That is usually a relatively mechanical process dictated by the particular customer's communications needs. On the infrequent occasions when subscriber placement is more than a routine matter, Sobel is consulted and has the final say.

36. Kay is reselling capacity on Sobel's 800 MHz repeaters directly to the public. In this context, the contractual arrangement for service is between Kay and the user. Nonetheless, Sobel has and exercises a degree of control not usually enjoyed by a facilities-based carrier vis-à-vis its resellers. For example, the price to be charged for repeater service is largely dictated by local industry standard, and Sobel has personally determined when to make adjustments. He has even on occasion overruled Kay's decision as a reseller regarding the rates to be charged. Sobel has the right to approve or disapprove any service contracts entered into by Kay, and customers who contract with Kay do not receive service until their units are activated by Sobel.

37. On the question of the preparation and filing of FCC applications, Sobel once again has maintained complete and total control. Sobel has relied on Kay to advise him and to prepare much of the FCC and frequency coordination paperwork for the 800 MHz repeaters, but Sobel always reviews Kay's work and nothing has ever been filed with the Commission on Sobel's behalf before Sobel has reviewed,

approved, and signed it. The decision to rely on Kay for the preparation of the 800 MHz applications was a matter of convenience. Kay had a special software package that generated the appropriate FCC forms and, having had experience completing forms by hand, Sobel decided to take advantage of its availability. In fact, on some occasions Sobel actually prepared the applications using Kay's computer. On most occasions, however, Kay prepared the applications to be reviewed and signed by Sobel.

38. The address used on the 800 MHz applications was Sobel's home office, and any subsequent correspondence from the FCC came directly to Sobel. Kay thus became involved in Sobel's response to any FCC correspondence only at Sobel's request and with Sobel's oversight. The review of Kay's work by Sobel was not a mere formality. Sobel is personally familiar with the FCC's procedures and application forms, having prepared a number of applications himself for his UHF repeaters. Kay's involvement in the preparation of Sobel's FCC filings is no different than the reliance applicants and licensees typically place on legal counsel, consulting engineers, and/or application processing firms. The use of such third-party consultants does not deprive the applicant of control.

(iv) Who is in charge of employment, supervision, and dismissal of personnel?

39. Sobel has no employees. The maintenance and operation of the UHF repeaters is not labor intensive. Kay and Kay's employees, of course, sell service to end users and bill and collect for such services, but they are acting as resellers of service on Sobel's system in this regard. They are not station employees. In any event, Kay has not hired any additional employees to market the 800 MHz service on Sobel's stations, and Sobel is in daily contact with Kay and those Kay employees who do market service on Sobel's repeaters. *Cf. ETC Summary Decision*, 10 FCC Rcd at 12560.

(v) Who is in charge of the payment of financing obligations, including expenses arising out of operating?

40. The operating expenses for the 800 MHz repeaters is not substantial. The two major expenses are site rental and payments on any leased equipment. In addition there may be power charges and telephone line charges (which are minimal in the case of Sobel's stations because he does not provide interconnected service). Finally, there may be occasional regulatory costs, such as frequency coordination fees, FCC application filing fees, and fees for Forestry Service permits for sites located on US forestry land. Sobel made a business decision to enter into an arrangement with Kay providing that Kay would assume all of the operational expenses of the 800 MHz repeaters. The same agreement,

however, provided that Kay would be entitled to the first \$600 of monthly revenue per repeater to cover these expenses. In that sense, then, Sobel has and does pay the operating expenses by foregoing his right to the first \$600 of monthly revenue.

41. The parties might have structured their deal differently. For example, they might have provided Kay would pay Sobel an established amount for bulk service on the repeaters, with Kay then keeping all revenue. (The existing arrangement provides that Sobel and Kay will split equally all revenue above \$600 per repeater per month.) Or, they might have provided that, instead of acting as a reseller, Kay would function more in the nature of an agent, with all revenues coming to Sobel less an agreed upon commission for Kay. In either of these cases, the licensee typically would be directly responsible for operating costs. But Sobel negotiated a different arrangement that allowed him to satisfy his obligation to pay operating costs out of the station revenues. This was a sound business decision to defer cash payments and minimize risk; it was not a transfer of control.

(vi) Who receives monies and profits from the operation of the facilities?

42. Sobel has contracted to receive one half of all revenue beyond \$600 per repeater per month. The only reason he has not actually received any money pursuant to this agreement is that the Bureau has frozen processing on his applications and other filings seeking to enhance and improve the stations, thereby making the service more useful and marketable. Even a voluntary deferral of distribution of profits by a licensee does not necessarily indicate a lack of control. See *ETC Summary Decision*, 10 FCC Rcd at 12561-12562. In this case, however, Sobel's decision is not voluntary. It was brought about by circumstances beyond his control, namely, regulatory delay. Sobel, who has more than 20 years of experience in the Los Angeles land mobile radio industry, testified that he fully expected to be realizing a significant sum of money from his 800 MHz repeaters long before now, but for the processing freeze on his FCC filings. In any event, the arrangement whereby Kay collects the revenue, keeps the first \$600, and equally splits the remainder with Sobel, is neither out of line with industry practice nor legally questionable on its face. The Commission has, in fact, approved SMR management agreements which provide for the manager retaining 70 to 80 percent of the revenue, or even 100 percent when the management duties are undertaken in contemplation of a purchase of the stations. *Motorola, Inc.* at ¶¶ 3,

8-10. The Bureau, which has the burden of proof, offers no evidence that there is any other reason for Sobel's failure to realize the anticipated revenue.

C. The Written Agreement

43. The Commission suggests, in the *HDO*, and the Bureau contends, in its prosecution of this case, that the 30 December 1994 written agreement between Kay and Sobel, on its face, constitutes an unauthorized transfer of control. Sobel denies that he has, by the written agreement or otherwise, ceded control of his 800 MHz stations to Kay. The agreement itself expressly acknowledges that Sobel (not Kay) "possesses such financial interest or control in such authority ... such that [Sobel] is the exclusive owner of the license for the Stations." (SBL Ex. 3, p. 1) Further, Section VIII of the written agreement expressly provides:

Licensee shall retain ultimate supervision and control of the operation of the Stations. Licensee shall have unlimited access to all transmitting facilities of the Station, shall be able to enter the transmitting facilities and discontinue any and all transmissions which are not in compliance with FCC Rules and shall be able to direct any control point operator employed by Agent to discontinue any and all transmissions which are not in compliance with FCC Rules. All contracts entered into with end users of the Stations' services shall be presented to the Licensee, either by original proposed contract or copy thereof, before such contracts go into effect, and Licensee shall have the right to reject any such contract within five (5) days of presentation, however, such rejection shall be reasonable and based on the mutual interests of the parties. Licensee shall have the right to locate the Stations' transmitting facilities at any place of Licensee's choosing, provided, however, that after the original construction of the transmitting facilities of the Stations is completed and/or following execution of this agreement, Licensee shall give sixty (60) days notice to Agent of any future relocation of any of the Stations. Such relocation shall only occur if it is in the best interest of both Parties.

(SBL Ex. 3, p. 5, ¶ VII)⁸ The agreement itself, therefore, expressly gives Sobel more than adequate supervision and oversight authority to maintain control of the licensed stations, and the record overwhelmingly supports the conclusion that he has actively and consistently exercised such authority.

⁸ The agreement goes on to state: "Except as provided specifically herein, nothing contained herein shall provide to Licensee the ability to supervise directly any personnel employed by Agent." (SBL Ex. 3, p. 5, ¶ VIII.A) The Bureau suggests that this deprives Sobel of appropriate personnel authority under the fourth *Intermountain Microwave* factor, but this is not the case. The provision itself excludes matters "provided specifically herein," and thus preserves Sobel's rights to supervise Kay employees as to matters expressly stated in the rest of paragraph VIII or in other parts of the agreement that relate specifically to Sobel's stations. The purpose of this provision was to preserve the status of Kay and Sobel as independent contractors vis-à-vis one another, and this is clear when the provision is read in conjunction with paragraph V of the agreement. (SBL Ex. 3, p. 3, ¶ V). Indeed, that subparagraph VII.A was considered necessary at all is an indication of the extent of oversight authority given to Sobel in paragraph VII.

44. There are provisions in the agreement that purport to give Kay exclusive control over certain matters, e.g., marketing (SBL Ex. 3, p. 2, ¶ I), management (SBL Ex. 3, p. 2, ¶ II), and maintenance (SBL Ex. 3, p. 3, ¶ III), but Sobel (who is not a lawyer and who, admittedly, did not review the agreement carefully before signing it) testified that he understood these provisions to give Kay exclusive rights vis-à-vis third parties, but not vis-à-vis Sobel himself. (Tr. 265-266) Thus, Sobel did not believe he was contracting away his right to do these things personally, rather, only his right to contract with a third person other than Kay to do them.

45. No reading of the agreement can lead to the conclusion that it relieves Sobel of control over his stations, and even then such an interpretation would be at odds with the established facts. The written agreement was entered into long after the relationship between the parties was already established. The purpose of the agreement was merely to document the distinction in legal identity between Kay and Sobel. The agreement was not intended actually to change either the relationship between the parties or their conduct, and it in fact worked no such change. The parties continued to operate after execution of the agreement in the same manner as they had before. As the Commission has opined, in determining who has control under the *Intermountain Microwave* indicia, "the record of actual conduct ... outweighs the contractual provisions." *La Star Cellular Telephone Company*, 9 FCC Rcd at 7111.⁹ Regardless of how the Bureau may choose to interpret the written agreement, the record of actual conduct in this case demonstrates conclusively that Sobel has at all times maintained and actively exercised actual control over the 800 MHz stations.

D. The Option to Purchase

46. The written agreement confers on Kay an option to purchase any of Sobel's 800 MHz authorizations for \$500 per station. (SBL Ex. 3, p. 4-5, ¶ VII) As with virtually every other item in the agreement, this was a subject of informal oral understanding between Kay and Sobel before it was ever reduced to writing. The Bureau points to the option provision as a further indicator of Kay's alleged control, suggesting that the \$500 purchase price is substantially below the market value. (However, the

⁹ It was, interestingly, the Wireless Telecommunications Bureau which, in *La Star*, argued that the "agreement should not be credited because other aspects of this record indicate that [the applicant] has not acted consistently with the provisions of the joint venture agreement." 9 FCC Rcd at 7110. The Bureau can not have it both ways, choosing to hold licensees to an agreement or disregarding an agreement depending on its posture in a given case.

Bureau, which has the burden of proof, provided no evidence of the actual market value of any of the stations). But the option neither constitutes nor provides evidence of a transfer of control. The record indicates that there are valid business reasons for both the existence of the option (to protect Kay who is using the Sobel stations to service long term customer contracts) and the specified \$500 purchase price (the likely value of the encumbered stations at the time Sobel acquired the licenses, with Kay having incurred the expense of any enhancement in value by clearing the channels).

47. The actual conduct of the parties, however, belies any suggestion that the option provision constitutes a "gift" of the stations to Kay, or that it gives Kay leverage with which to exert undue control over Sobel. Notwithstanding the written \$500 provision, Sobel knows that if a station is sold, he will receive appropriate compensation, with Kay being reimbursed for expenses incurred in enhancing the value of the station. In one case Sobel received \$20,500 from the sale of station, substantially more than the \$500 option price. On another occasion, Sobel rejected a proposed sale of his stations for \$1,500,000 brought to him by Kay. This was at a time when Kay was in need of the money to finance his extensive legal costs. This is a clear indication that the option provision does not deprive Sobel of control.

48. An option to purchase does not, in any event, constitute a transfer of control unless it is exercised. A mere option does not rise to the level of an actual ownership interest cognizable for most purposes under FCC regulation and policy, including questions of real party in interest and transfer of control. *Turner Broadcasting System, Inc.*, 101 FCC 2d 843, 849 (1985); *Miller Communications, Inc.*, 3 FCC Rcd 6477, 6479 (Mob. Serv. Div. 1988). Nothing in the record offered by the Bureau is to the contrary.

IV. CONCLUSION

49. Sobel and Kay have entered into a business arrangement that is common in the industry and is mutually beneficial to both parties. Sobel has continually maintained hands-on, day-to-day, operational control over both his UHF and 800 MHz repeaters. "As long as the licensee maintains the requisite degree of control ... consistent with its status as a licensee, [the Commission] will not question its business judgment concerning the agreements into which it enters." *Motorola, Inc.* at ¶ 21. The Bureau has utterly failed in meeting its burden of proof that there has been an unauthorized transfer of control and that Sobel is unqualified.

WHEREFORE, it respectfully requested that the issues in this proceeding be resolved in favor of Marc D. Sobel d/b/a Airwave Communications, and that the captioned applications and filings be processed forthwith.

Respectfully submitted,

**MARC D. SOBEL AND MARC D. SOBEL
D/B/A AIRWAVE COMMUNICATIONS**

A handwritten signature in black ink, reading "Robert J. Keller", is written over a horizontal line.

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